Supreme Court, U.S.
FILED
AUG 3 1998
OFFICE OF THE CLERK

No. 98-38

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PAUL W. BERGER and ERMA R. BERGER,
Cross-Petitioners,
v.
CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, and JACK HAMANN,
Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK, INC.
One CNN Center
P.O. Box 105366
Atlanta, GA 30348-5366

P. CAMERON DEVORE *
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC M. STAHL
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

* Counsel of Record
Counsel for Cross-Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Do members of the news media violate the Electronic Communications Privacy Act (18 U.S.C. § 2510, *et seq.*) when, as part of their news coverage of a law enforcement action, they record conversations of a law enforcement agent, with the agent's consent?

2. Must an appeals court issue an injunction restraining members of the news media from future telecasts of news footage based solely on unproven allegations that the footage was improperly obtained, where there has been no final judicial determination as to the propriety of the newsgathering, no allegation that the footage itself may appropriately be enjoined, and no factual showing that other, less intrusive remedies are inadequate?

RULE 29.6 LISTING

Time Warner, Inc. is the parent company of Cross-Respondent Turner Broadcasting System, Inc. ("TBS") which, in turn, is the parent company of Cross-Respondent Cable News Network, Inc. ("CNN"). Neither TBS nor CNN has any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
A. Factual Background	3
B. Proceedings Below	8
REASONS THE WRIT SHOULD BE DENIED	11
I. THE HOLDING THAT CNN DID NOT VIOLATE THE WIRETAP ACT WAS CORRECT, DOES NOT CONFLICT WITH ANY OTHER DECISION, AND CAN BE UPHELD ON GROUNDS INDEPENDENT FROM THOSE UPON WHICH THE NINTH CIRCUIT RELIED	12
A. Review by This Court Is Unnecessary Because the Wiretap Act Expressly Permits Journalists To Record Conversations for Newsgathering Purposes	13
B. If, as the Ninth Circuit Found, CNN Acted Under Color of Law for *Bivens* Purposes Based on CNN's Alleged Association With Law Enforcement Agents, then 18 U.S.C. § 2511(2)(c) Applies and Expressly Exempts CNN from Wiretap Act Liability	19
II. REVIEW OF THE NINTH CIRCUIT'S REFUSAL TO ISSUE A PRIOR RESTRAINT IS NOT WARRANTED	23

TABLE OF CONTENTS—Continued

Page

A. This Case Does Not Raise the Question Presented in the Cross-Petition as There Has Been No "Final Judicial Determination" That CNN Did Anything Unlawful 23

B. The Denial of the Bergers' Requested Prior Restraint of News Footage Follows From an Unbroken Line of Authority From This Court 24

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page

Bailey v. United States, 516 U.S. 137 (1995) 17
Benford v. American Broad. Co., 502 F. Supp. 1159 (D. Md. 1980), *aff'd*, 661 F.2d 917 (4th Cir. 1981) 18
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) ....*passim*
Boddie v. American Broad. Co., 731 F.2d 333 (6th Cir. 1984) 18
Butz v. Economou, 438 U.S. 478 (1978) 8
CBS, Inc. v. Davis, 510 U.S. 1315 (Blackmun, Circuit Justice 1994) .....*passim*
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) .. 28
Desnick v. American Broad. Co., 44 F.3d 1345 (7th Cir. 1995) 15, 16
Deteresa v. American Broad. Co., 121 F.3d 460 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840 (May 26, 1998) 15
Georgia Soc'y of Plastic Surgeons v. Anderson, 363 S.E.2d 140 (Ga. 1987) 27
Goldblum v. National Broad. Co., 584 F.2d 904 (9th Cir. 1978) 27
Harte-Hankes Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 16
In re King World Prods., 898 F.2d 56 (6th Cir. 1990) 26
Lothschuetz v. Carpenter, 898 F.2d 1200 (6th Cir. 1990) 27
Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) 9
Matter of Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986) 25, 26
Monroe v. Pape, 365 U.S. 167 (1961) 22
Near v. Minnesota, 283 U.S. 697 (1931) 26, 27
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 12, 24, 26
New York Times Co. v. United States, 403 U.S. 713 (1971) 11, 24, 26
Omron Atl. Corp. v. Barr, 990 F.2d 861 (6th Cir. 1993) 20, 22
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 2, 23

TABLE OF AUTHORITIES—Continued

Page

Russell v. American Broad. Co., 23 Med. L. Rptr. 2428 (N.D. Ill. 1995) 14, 15, 16
Smith v. Phillips, 455 U.S. 209 (1982) 13
Sussman v. American Broad. Co., 971 F. Supp. 432 (C.D. Cal. 1997) 15
Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994) 14, 20, 21, 22
Wilson v. Layne, 141 F.3d 111 (4th Cir. April 8, 1998) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 1, 2
7 U.S.C. § 136j (a) (2) (G) 7
18 U.S.C. § 2120 9
18 U.S.C. § 2511 ..... *passim*
18 U.S.C. § 2511 (2) (c) ..... *passim*
18 U.S.C. § 2511 (2) (d) ..... *passim*
42 U.S.C. § 1983 ..... 8, 10

MISCELLANEOUS

4 William Blackstone, *Commentaries* *151, 152 27
Robert L. Stern et al., *Supreme Court Practice* 373 (7th ed. 1993) 13
S. Rep. No. 99-541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S.C.C.A.N. 3555 ..... 3, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-38

PAUL W. BERGER and ERMA R. BERGER,
Cross-Petitioners,
v.
CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, and JACK HAMANN,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann (collectively, "CNN") respectfully request that this Court deny the conditional Cross-Petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED *

In addition to the Constitutional Provisions and Statutes Involved cited by the Bergers, Cross-Pet. at 2-4. The Cross-Petition also involves the First Amendment to the Constitution of the United States, which provides as follows:

* As originally served, the Cross-Petition misquotes 18 U.S.C. § 2511(2)(d). Cross-Pet. at 4. Just prior to filing this Brief in Opposition, CNN received notice that the Bergers have filed a revision with the Clerk correcting this error.

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

STATEMENT OF THE CASE

The issues raised in the Bergers' Cross-Petition do not merit review by this Court. First, the Cross-Petition presents no valid grounds for undermining the well-established principle that the Wiretap Act expressly permits the recording of a conversation where one party consents. This Court's review is unnecessary: The Bergers complain that the Ninth Circuit erred in applying the Wiretap Act's "color of law" exemption, 18 U.S.C. § 2511(2)(c), to CNN. But even if the Bergers are correct, the judgment reached by the Ninth Circuit would be affirmed because, as the district court held, a separate exemption, 18 U.S.C. § 2511(2)(d), permits parties *not* acting under color of law to record conversations, with one party's consent, for newsgathering or other non-tortious, non-criminal purposes. The Bergers ignore numerous decisions considering the precise issue presented in their Cross-Petition, all of which hold that § 2511(2)(d) —both on its face and by specific congressional intent— permits the type of newsgathering activity CNN engaged in here. Furthermore, the Bergers attempt to manufacture a "conflict" between a Seventh Circuit case and the opinion below regarding the meaning of the phrase "color of law" in the Wiretap Act, but there is no material conflict: The courts' reasoning is in complete accord.

Second, the Ninth Circuit's decision not to enjoin CNN from future broadcasts of news footage follows from an unbroken line of authority, from this Court and others, reiterating the "heavy presumption" against the constitutionality of any prior restraint of the news media. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The Bergers' argument—that allegations of improper newsgathering by CNN somehow justify enjoining the telecast of the acquired truthful news footage—

has been considered and universally rejected by this Court and others.

The Bergers' Cross-Petition ignores the fundamental fact that CNN in this case was doing what our Constitution assumes the news media will do—gather and report the news. Instead, the Bergers seek to characterize the ordinary and longstanding journalistic practice of reporting on government law enforcement activities as nothing but a calculated intrusion on the rights of criminal suspects. According to the Cross-Petition, the fact that CNN was reporting on newsworthy events is irrelevant, because the resulting news coverage may also be "sensational" and entertaining. Cross-Pet. at 5. For the Bergers, it is but a small step from demeaning (or deliberately disregarding) CNN's exercise of its First Amendment newsgathering function, to asserting that civil [1] liability ought to attach to CNN's actions, and that the courts may, by injunction, control CNN's future editorial decisions. These contentions are inconsistent with First Amendment principles and not worthy of this Court's review.

A. Factual Background

Cross-Respondents herein are Cable News Network, Inc., a twenty-four-hour television news network; its parent company Turner Broadcasting System, Inc. ("TBS"); Jack Hamann, a news reporter for CNN; and Robert Rainey and Donald Hooper, CNN employees who served as Hamann's camera crew.[2]

---

[1] Under the Bergers' interpretation of the Wiretap Act, CNN and other news outlets recording conversations for newsgathering purposes also could be criminally liable. *See* 18 U.S.C. § 2511(1). "Such a threat is inconsistent with the guarantees of the first amendment." S. Rep. No. 99-541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571 (§ 2511(2)(d) specifically intended to clarify that journalists may record conversations so long as one party consents).

[2] Cross-Petitioners Paul and Erma Berger, plaintiffs below, brought two separate actions arising from the events described here. One named Cable News Network, Inc. and Hamann as defendants; the other named TBS, Rainey, and Hooper, as well as

Reporter Hamann is a Seattle-based correspondent for CNN who regularly reports on environmental matters and other news from the western United States. ER *Hamann* 5/2; *Hanlon* 8/2.[3] In 1993, while working for the CNN Environment Unit, he heard reports that western ranchers were poisoning endangered species in violation of federal law, often with impunity since local officials and juries were sympathetic toward the ranchers' efforts to protect livestock from predators. ER *Hamann* 5/2; *Hanlon* 8/2. Hamann decided to investigate what, if anything, federal authorities were doing to stop the illegal wildlife killings.

In the course of his newsgathering process, Hamann learned that the United States Fish and Wildlife Service ("FWS") was investigating a report that a Montana rancher—who, unbeknownst to Hamann at the time, was Paul Berger—was killing eagles unlawfully on his 75,000-acre property, and that the FWS would be searching the rancher's property for evidence of this criminal activity.[4]

---

certain federal government actors (the United States of America, an Assistant U.S. Attorney, and four U.S. Fish and Wildlife Service ("FWS") agents) as defendants. The actions proceeded on identical courses in the district court and were treated as consolidated on appeal. App. 7a, 49a n.1. CNN has petitioned for certiorari seeking review of the Ninth Circuit's holdings (1) that CNN was a "joint actor" with the FWS agents and thus acted under color of law for purposes of *Bivens* liability, and (2) that law enforcement agents violate clearly established Fourth Amendment rights when they permit journalists to observe and record the execution of a warrant, 66 U.S.L.W. 3783 (U.S. May 26, 1998) (No. 97-1914)| The individual government agents filed a separate petition for certiorari seeking review of the Ninth Circuit's qualified immunity and Fourth Amendment holdings. 66 U.S.L.W. 3783 (U.S. May 26, 1998) (No. 97-1927).

[3] The excerpts of record ("ER") refer to the two volumes Cross-Petitioners filed in each of the two actions ("*Hamann*" or "*Hanlon*," respectively). The references are to tab number within the ER, exhibit within the tab, and page number within the exhibit.

[4] Mr. Berger was suspected of deliberately poisoning and shooting eagles—and not, as the Cross-Petition asserts, at 7 n.4, of merely killing eagles in the course of his efforts to also kill predatory coyotes. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 8/page 13. *See*

The FWS investigation of Berger had begun *before* Hamann became interested in reporting on illegal wildlife killings; it had been ongoing for at least two months at the time the FWS gave CNN permission to observe the search. App. 4a. This permission was confirmed in a letter stating that the government "agrees to allow CNN to accompany USFWS Agents as they execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." The letter further stated that CNN retained "complete editorial control" over any footage it recorded of the search, but that CNN would not show any footage until such time as doing so posed no risk to any defendant's fair trial rights.[5]

As part of its coverage of the search, CNN attended a briefing for FWS agents the day before the warrants were executed. Hamann asked a few questions regarding the nature of the poisons allegedly used by Berger and local ranchers' views about federal authorities, ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 5/pages 6-8, but the record contains no evidence that CNN played any role in the briefing, assisted in planning or executing the search, or coordinated in any way with the government beyond what was necessary to arrange to observe and record the search for newsgathering purposes.[6]

---

also id. Tape 7/page 11, which records Berger as stating, "I'll kill every son of a bitch [eagle] I get a chance to."

[5] This was the complete substance of the letter, which is set out in full in the Ninth Circuit opinion. App. 4a-5a. The letter merely grants CNN permission to *accompany* the government agents. It plainly does not, as the Bergers assert, give CNN " 'exclusive access' to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings . . . ." Cross-Pet. at 6. Nor does CNN therein agree to "grant[] the Government's express desire to publicize its efforts to enforce environmental laws." *Id.* at 7. The agreement expressly states that CNN "shall not be obliged to use the footage," App. 5a, belying the Bergers' suggestion of any *quid pro quo* arrangement.

[6] Specifically, the record provides no support for the Bergers' unsubstantiated claim that CNN was "made privy to confidential

On the day of the search, the large group of government agents executing the search warrants drove to the ranch, followed in a separate private vehicle by Hamann, Rainey, and Hooper. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 6/page 3-Tape 7/page 2. One of the government vehicles had a small, fixed CNN camera visibly mounted on its hood facing into the vehicle, and FWS agent Joel Scrafford wore a microphone that transmitted sound to the CNN crew. App. 6a; ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 7/pages 1-23-Tape 20/page 1.[7] It is undisputed that Scrafford consented to wearing the microphone and to having his conversations recorded by CNN. App. 22a, 42a, 54a.[8] The CNN crew members were dressed in casual clothes and thus were readily distinguishable from many of the law enforcement officers on the scene who were either in uniform or wore hats or jackets with government agency patches or labels, and were visibly armed with handcuffs and guns. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 6/pages 3-4.[9]

---

information about the Bergers and the criminal investigation . . . ." Cross-Pet. at 7-8 n.5.

[7] Contrary to the Bergers' assertions, Cross-Pet. at 5, the CNN crew did not ride in any government vehicle.

[8] It also is undisputed that Scrafford, in his capacity as an FWS agent, participated in the investigation of Paul Berger's suspected criminal activity and in the execution of the valid search warrants. The Bergers do not explain their characterization of Scrafford as a "human 'boom mike' " and "simply a piece of recording equipment." Cross-Pet. at 9, 18, 22. Whether or not this is meant as hyperbole, it is misleading to the extent it implies that Scrafford played no role in executing the warrants or investigating Paul Berger. A more accurate characterization of the undisputed facts surrounding Scrafford's activity is that he was an FWS agent, on the Berger property to execute a valid search warrant, who also agreed to facilitate CNN's newsgathering efforts by wearing a microphone.

[9] The Bergers' claim, Cross-Pet. at 8, that Agent Scrafford threatened to arrest Paul Berger if he was uncooperative, is misleading. The record indicates that when the agents first encountered Berger, Scrafford told him, "[W]e aren't going to arrest you." ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 7/page 7. Later, Scrafford told Berger that if Berger did not cease interfering with

While the FWS agents executed the warrant, the journalists videotaped portions of the agents' authorized search of the ranch, its outbuildings and surrounding public roads. App. 6a. CNN never entered the Bergers' home, though Agent Scrafford did, with Berger's consent. *Id.*[10] Berger's voluntary conversations with the FWS agent both inside and outside the house were recorded through the microphone Scrafford was wearing. *Id.*

During the search, which lasted several hours, the CNN crew interviewed one of the government officials present for the execution of the warrant, Assistant United States Attorney Kris McLean. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 11/pages 2-8. McLean stated in the interview that the government's purpose in allowing CNN to record the FWS search was to educate the public that the government does enforce criminal laws protecting wildlife, and that there are consequences to illegally poisoning protected species. *Id.* page 8.

Based on evidence seized during the search, Berger was charged with violating federal laws that prohibit killing eagles. A jury convicted him of applying a pesticide to sheep carcasses with the intent to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G). He was acquitted of three other charges. App. 7a.

---

federal poison specialists trying to photograph poisons found on the property Scrafford would have no choice but to arrest him. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 8/page 3.

[10] The Bergers' assertion that Agent Scrafford "neither requested nor received permission from [the Bergers] to enter their residence" is shown by the record to be untrue. The tape log records the following conversation between Scrafford and Paul Berger outside the Berger home, while Mrs. Berger was inside:

> Scrafford: Do you want me to try and explain it, or do you want to talk to her?
>
> Berger: No, come on in . . .
>
> Scrafford: Okay . . . just . . . don't want to get her upset any more than we have to.

ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 7/page 16.

Seven months after the search, and two months after Paul Berger's criminal conviction, CNN used portions of its footage of the search on its regular environmental news programs "Earth Matters" and "Network Earth" as part of its news coverage of government efforts to protect endangered species. The footage made up only a portion of each program. The programs were shown in October 1993 and several times in 1994. App. 2a; ER *Hamann* 5/9; *Hanlon* 8/9. They have not been shown since 1994.

B. Proceedings Below

After Berger's criminal conviction, he and his wife brought these civil actions against CNN and the government. The Bergers sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming primarily that the federal agents violated Plaintiffs' Fourth Amendment rights by permitting the news media to attend and record the search, and that by observing the search, CNN acted under color of federal law and thus would be accountable for a Fourth Amendment violation as if it too were a government actor. App. 3a. The Bergers also sued CNN for alleged violations of the Wiretap Act, for a variety of state law claims, and for an injunction barring further broadcasts of the news footage recorded during the execution of the search warrant. *Id.*

The district court granted summary judgment for CNN on all issues. The court found, first, that the Bergers could not show that CNN acted under color of federal law—one of the requisites for *Bivens* liability. "When a private party, such as [CNN], is present during a search as a means of furthering its own interests, it is not acting under color of law and is not liable under *Bivens*." App. 41a; *accord, id.* at 54a.[11]

---

[11] The requirement under *Bivens* that the defendant act under color of federal law is akin to the "under color of state law" showing required under 42 U.S.C. § 1983. *Butz v. Economou*, 438 U.S. 478, 500-01 (1978). Both standards generally are treated as the

As for the Bergers' claim under the Wiretap Act, which permits civil suits for the intentional interception of certain communications, the district court held that one of the Act's provisions expressly permitting the recording of communications applied. App. 21a, 41a, 54a; 18 U.S.C. §§ 2511, 2120. That provision, in pertinent part, permits the interception of oral communications (1) by a party "not acting under color of law," (2) where one of the parties to the communication has given prior consent to the interception, (3) so long as the communication is not "intercepted for the purpose of committing any criminal or tortious act . . . ." 18 U.S.C. § 2511(2)(d). The district court found CNN was not acting under color of law (a logical extension of its holding that CNN was not liable under *Bivens*), and that the FWS agents consented to having CNN record their conversations. The court also held that CNN had not recorded the conversations for the purpose of committing a crime or tort. "Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain." App. 42a, 55a.

The Ninth Circuit affirmed that CNN did not violate the Wiretap Act, but on different grounds. To understand why, reference must be made to the circuit court's conclusion on the Bergers' principal claim: The court found for the Bergers on their *Bivens* claim, holding that the search of the Berger ranch was nothing more than a joint government/media venture, under the guise of a legitimate law enforcement action, to acquire publicity for the FWS and television footage for CNN. App. 2a-3a, 9a-10a. Reversing the district court, the Ninth Circuit found that the FWS violated the Bergers' Fourth Amendment rights by inviting journalists to observe the search of the property, and that CNN could be held liable as well by virtue of its joint planning and partici-

---

equivalent of the "state action" showing required to assert constitutional violations in other contexts. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924, 928-29 (1982).

pation with the government in the search. App. 9a-10a, 17a-21a.

The Ninth Circuit did not consider, as the district court did, whether 18 U.S.C. § 2511(2)(d) expressly permitted CNN to record the FWS agent's conversations on the Berger ranch. Rather, the court turned in the first instance to 18 U.S.C. § 2511(2)(c), which applies on its face to persons "acting under color of law," and permits such persons to record conversations where one of the parties consents. The court recognized that "the phrase 'under color of law' in the wiretap context is not equivalent to the scope of the phrase in the general [42 U.S.C.] section 1983 or *Bivens* context," in that 18 U.S.C. § 2511(2)(c) "was not created to exempt all government employees from liability . . .: Its core aim must have been to exempt those acting under law enforcement authority." App. 21a-22a. Thus, the court found that CNN satisfied the statutory "color of law" requirement because "both the federal appellees and the media appellees were acting under authority of a search warrant." App. 22a. Though the court's analysis on this point is cursory, it clearly followed the internal logic of its *Bivens* finding: Since the court found that CNN acted under color of law for *Bivens* purposes—based on CNN's alleged participation with the FWS agents in the agents' prosecution of their law enforcement duties—the court also concluded that CNN was acting under law enforcement authority for Wiretap Act purposes.

The Bergers also sought an injunction preventing further broadcast of any of the news footage gathered during the search. Both the district court and the Ninth Circuit recognized that the Bergers' claim "is essentially a request for a prior restraint, which carries a 'heavy presumption against its constitutional validity.'" App. 25a (*quoting CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994)); *accord* App. 42a, 55a. The district court held that the Bergers failed to show this "is an exceptional case that would justify the

imposition of a prior restraint." App. 43a, 56a. The Ninth Circuit held that "[e]ven though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction." App. 25a (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

REASONS THE WRIT SHOULD BE DENIED

The Cross-Petition should be rejected because the issues it raises do not require review by this Court. The Ninth Circuit's judgment that CNN did not violate the Wiretap Act by virtue of § 2511(2)(c)'s "color of law" exception does not conflict in any material or important fashion with any other court's decision. Further, even if the Court were to find that CNN did not act under color of law, an independent basis exists for affirming the Ninth Circuit's decision that CNN did not violate the Wiretap Act. Specifically, if the Ninth Circuit is incorrect and CNN did *not* act under color of law for Wiretap Act purposes, then CNN's recordings were expressly permissible under 18 U.S.C. § 2511(2)(d). Since one or the other of these Wiretap Act provisions must, as a matter of simple logic, apply, the Ninth Circuit's judgment would be affirmed no matter how this case proceeds.

Regarding the rejection, by both the Ninth Circuit and the district court, of the Bergers' requested injunction, this case does not raise the question presented in the Cross-Petition: The Bergers argue from the premise that a "final judicial determination" has already been made that CNN's conduct was illegal or unconstitutional. In fact, there is no judgment against CNN; the Ninth Circuit simply reversed the district court's grant of summary judgment in CNN's favor and remanded for further proceedings. More significantly, the Bergers' requested prior restraint fails to overcome the heavy presumption against such injunctions. This Court and others consistently have ruled that the types of allegations the Bergers have leveled against CNN do not, even if proven true, provide a suffi-

cient basis for "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976). The Ninth Circuit's decision is consistent with, and follows from, the decisions of this Court and others.

I. THE HOLDING THAT CNN DID NOT VIOLATE THE WIRETAP ACT WAS CORRECT, DOES NOT CONFLICT WITH ANY OTHER DECISION, AND CAN BE UPHELD ON GROUNDS INDEPENDENT FROM THOSE UPON WHICH THE NINTH CIRCUIT RELIED.

The Wiretap Act contains two broad provisions that expressly permit the recording of oral communications where one participant to the communications consents. One applies to parties "acting under color of law," 18 U.S.C. § 2511(2)(c), the other to parties "not acting under color of law." *Id.* § 2511(2)(d). As a matter of simple logic, CNN must fall into one of these two categories.[12] If CNN did not act under color of law—as the district court found, as CNN has always contended, and as the Bergers themselves only now assert—then § 2511(2)(d) exempts CNN from any Wiretap Act liability. The Bergers' contention that § 2511(2)(d) would not apply because CNN acted "for the purpose of committing any criminal or tortious act" ignores the plain language of the statute, mischaracterizes the provision's legislative history, and is at odds with the relevant case law, all of which hold that journalists who record conversations with the consent of one party in the course of newsgathering are protected from Wiretap Act liability. If CNN did act under color of law, as the Ninth Circuit found, then on its face § 2511(2)(c) applies to permit CNN's actions.

---

[12] CNN's contention is that it did not act under color of law in any way—neither for purposes of civil-rights liability *nor* under the Wiretap Act. *See* Pet. for Cert., 66 U.S.L.W 3783 (U.S. May 26, 1998) (No. 97-1914). But, as will be shown, CNN's conduct expressly is permitted whether or not it acted "under color of law" for purposes of the statute.

Because the judgment below must be upheld on one ground or the other, the Cross-Petition should be denied.[13]

A. Review by This Court Is Unnecessary Because the Wiretap Act Expressly Permits Journalists To Record Conversations for Newsgathering Purposes.

As CNN has argued in its Petition for Certiorari, the Ninth Circuit committed grave constitutional error in subjecting CNN, a private, independent news organization, to constitutional *Bivens* liability as if it were an arm of the government. But regardless of whether this Court grants or denies that petition, or affirms or reverses the Ninth Circuit's *Bivens* ruling, the Ninth Circuit's holding that CNN did not violate the Wiretap Act still is correct and will not be disturbed. If CNN did not act under color of law for purposes of the Wiretap Act, then a separate exemption to Wiretap Act liability, 18 U.S.C. § 2511(2)(d), necessarily applies. This separate ground for affirming the decision below means there is no need to reach the Wiretap Act issues, and certiorari is thus unwarranted. In addition, because the plain language of the statute, the specific legislative history of § 2511(2)(d), and decisions of other courts all unequivocally agree that section (2)(d) exempts from Wiretap Act liability the type of recording engaged in by CNN in this case, review by this Court simply is not called for.

Section 2511(2)(d) states that it is not unlawful for a person not acting under color of law to intercept a wire communication where a participant to the conversation

---

[13] A respondent "may, of course, defend the judgment below on any ground which the law and record permit"—including grounds considered only in the district court—"provided the asserted ground would not expand the relief which has been granted." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). In opposing certiorari, it is appropriate for respondents to demonstrate "that the presence of other meritorious arguments shows that the decision below is correct without regard for the question sought to be raised by the petition . . . ." Robert L. Stern et al., *Supreme Court Practice* 373 (7th ed. 1993).

has consented to the interception, "unless such communication is intercepted *for the purpose* of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d) (emphasis added). Agent Scrafford's consent to wear CNN's microphone and have his conversations recorded is not disputed. App. 22a. Therefore, assuming CNN did not act under color of law, the only remaining issue is whether CNN recorded the conversations "for the purpose of committing" a crime or tort.

On its face, § 2511(2)(d) requires examination of a party's "purpose" in recording a communication. "[T]he critical question under section 2511(2)(d) is *why* the communication was intercepted, not *how* the recording was ultimately used." *Russell v. American Broad. Co.*, 23 Med. L. Rptr. 2428, 2431 (N.D. Ill. 1995). A plaintiff must show the defendant "either intended to break the law or commit a tort against him . . . ." *Thomas v. Pearl*, 998 F.2d 447, 451 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994). Thus, a college basketball coach who recorded conversations with a potential recruit, after learning a rival school had offered the recruit improper perks, was protected from Wiretap Act liability by § 2511(2)(d) because the coach's intent was not to commit a tort or crime, but rather was "to call attention to unfair and illegal practices by a rival university." *Id.* at 452.[14]

---

[14] Though relying almost completely on *Thomas* for its discussion, in *dicta*, of the contrast between the meaning of "color of law" in 18 U.S.C. § 2511(2)(c) and in the civil-rights contexts, Cross-Pet. at 19-20, the Bergers seek to disavow *Thomas'* holding that the defendant had *not* violated the Wiretap Act. Cross-Pet. at 20. The Bergers attempt to distinguish the portions of the case that are unfavorable to their position by claiming that the plaintiff, Thomas, "did not allege any tort other than a wiretap violation alone." This is grossly misleading. After first noting that, "[a]lthough inartful, Thomas' complaint could be read to state a cause of action for any of three privacy torts," the Seventh Circuit went on to evaluate Thomas' wiretap claim on the assumption that the torts were properly alleged. 44 F.3d at 451-53. The court found that because the defendant's purpose was not tortious, his actions were permissible under § 2511(2)(d). *Id.*

Newsgatherers who, with one party's consent, record conversations for use in news reports are not acting for criminal or tortious purposes, and thus are protected from Wiretap Act liability by § 2511(2)(d). *Desnick v. American Broad. Co.*, 44 F.3d 1345 (7th Cir. 1995). In *Desnick*, producers of a television news program sent undercover reporters into eye surgery centers with hidden cameras and sound recorders to show deliberate misdiagnosis for financial gain. Plaintiffs claimed the newsgathering was tortious and violated the Wiretap Act. The court affirmed dismissal of the Wiretap Act count, finding that under § 2511(2)(d) the newsgatherers did not enter the eye centers for the purpose of committing a tort or crime. Significantly, even though the court found that "[m]aybe the program as it was eventually broadcast was tortious," the exemption from Wiretap Act liability applied because "[t]he defendants did not order the camera-armed testers into the Desnick Eye Center's premises in order to commit a crime or tort." *Id.* at 1353. The defendants' *purpose* was to gather news, and thus they were entitled to the protection of § 2511(2)(d). *Id.*

Other cases likewise hold that journalists engaged in newsgathering are not acting for criminal or tortious purposes and thus do not violate the Wiretap Act. *Deteresa v. American Broad. Co.*, 121 F.3d 460 (9th Cir. 1997) (broadcast, over plaintiff's objection, of video showing reporter and plaintiff talking is protected by § 2511(2)(d)), *cert. denied*, 118 S. Ct. 1840 (May 26, 1998); *Sussman v. American Broad. Co.*, 971 F. Supp. 432, 435 (C.D. Cal. 1997) ("[W]here a journalist is party to a conversation, the recording of such a conversation is not criminal or tortious conduct within the meaning of" § 2511(2)(d));[15] *Russell*, 23 Med. L. Rptr. 2428 (no Wire-

[15] *Sussman* is distinguishable from the instant case in that the reporter there participated in the conversations she recorded, whereas CNN was not a party to the conversations in question, but recorded them with a party's consent. The distinction, however, is entirely irrelevant because § 2511(2)(d) applies equally to both situations.

tap Act liability for hidden camera news investigation of sanitary conditions at plaintiff's fish market).

The relevant question in this case is not, as the Bergers assert, whether CNN's recording *eventually is held to be* tortious or criminal. Rather, as *Desnick* and *Russell* make clear, the relevant question under the Wiretap Act is *why* CNN chose to record Agent Scrafford's conversations during the search of the Berger ranch. As both the district court and the Ninth Circuit held, the undisputed answer is that CNN's purpose was to gather news information to use in its coverage of an important environmental issue, not to commit any crime or tort. Indeed, the district court, in a finding that was not disturbed by the Ninth Circuit, expressly held that the recordings were not made for criminal or tortious purposes. "Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain." [16] App. 42a, 55a; *see also* App. 23a (Ninth Circuit noting, in reversing district court's dismissal of state trespass claims, that "the officers invited the media for newsgathering, not for law enforcement").

Thus, the Bergers' Cross-Petition ignores the plain language of the statute and the case law, both of which make clear that 18 U.S.C. § 2511(2)(d) expressly permits consensual recording by parties acting for other than criminal or tortious purposes. Instead, the Bergers rely principally on a conclusory and mistaken interpretation of the Wiretap Act's broad legislative history. Cross-Pet. at 21-22. The Bergers assert that Congress intended the § 2511 exceptions to protect solely the "legitimate needs of law enforcement." *Id.* at 21 (not citing any congressional statement, but rather citing Department of Justice comments on bill). Under the Bergers' syllogism,

---

[16] It is well recognized in other contexts that commercial profit in no way diminishes the protections available for newsgathering. *See Harte-Hankes Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

CNN cannot benefit from § 2511 because CNN did not record Agent Scrafford's conversations for any legitimate law enforcement purpose.[17] *Id.*

This reasoning is fatally flawed. Statutory interpretation begins not with broad assertions about legislative history, but rather "with the language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). The plain language of § 2511(2)(d) states that the provision applies to individuals "not acting under color of law."[18] Also, the consensual recordings permitted by the statute are not limited to those that further law enforcement objectives; the statute plainly states that any such recording not done for tortious or criminal purposes is permissible.

Second, to the extent legislative history is relevant, the specific history of § 2511(2)(d) shows that Congress unequivocally intended for that provision to exempt journalists engaged in newsgathering from Wiretap Act liability. As originally enacted in 1968, § 2511(2)(d) made it unlawful to record conversations not only for tortious or criminal purposes, but also "for the purpose of committing any other injurious act." In 1986, Congress deleted the "injurious" purpose language *specifically to*

---

[17] The Bergers' syllogism also fails to recognize that the FWS had a legitimate law enforcement purpose for allowing CNN to cover its activities: to show the public there are consequences to illegally poisoning protected species. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 11/page 8 (interview with AUSA McLean). "It is in fact a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press." *Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998) (*en banc*), *petition for cert. filed*, —— U.S.L.W. —— (U.S. July 7, 1998) (No. 98-83).

[18] Indeed, the Bergers' argument collapses on itself. The Bergers, in discussing § 2511(2)(c), argue that under the Wiretap Act, a party only acts under color of law where he or she is furthering a law enforcement action. Cross-Pet. at 18-21. What they fail to acknowledge is that by their own reasoning, it necessarily follows that the phrase "*not* acting under color of law" in § 2511(2)(d) must encompass individuals who are *not* furthering law enforcement aims.

clarify that journalists who record a conversation with the consent of one of the participants do not violate the Wiretap Act. As the Senate Report of the 1986 amendment explained,

> In numerous court cases the term "other injurious purpose" has been misconstrued.[19] Most troubling of these cases have been attempts by parties to chill the exercise of first amendment rights through the use of civil remedies under [the Wiretap Act]. . . . This interpretation places a stumbling block in the path of even the most scrupulous journalist. Many news stories have been brought to light by recording a conversation with the consent of on[l]y one of the parties involved—often the journalist himself.

S. Rep. No. 99-541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571. The report explains that the amendment is necessary to assure that journalists do not face potential civil and criminal Wiretap Act liability for recordings "made in the ordinary course of responsible news-gathering activities and not for the purposes of committing a criminal act or a tort." *Id.*

Given this specific congressional intent that journalists engaged in newsgathering be exempt from Wiretap Act liability, as well as the absence of any conflict among the courts of appeal on the meaning of the post-1986 language of § 2511(2)(d), it is clear that CNN's conduct did not violate the Wiretap Act. Review by this Court is unnecessary.

---

[19] The Senate Report states that the 1986 amendment to § 2511(2)(d) was specifically intended to reject the holding of *Boddie v. American Broad. Co.*, 731 F.2d 333 (6th Cir. 1984), in which a reporter secretly recorded an interview with plaintiff and used a portion of the recording in a news broadcast. The court's conclusion, specifically rejected by Congress, was that the plaintiff could recover under the Wiretap Act by showing that the newsgathering was intended to insult or injure the plaintiff, even though the conduct was not tortious or criminal. *See also Benford v. American Broad. Co.*, 502 F. Supp. 1159 (D. Md. 1980) (holding, prior to 1986 amendment, that § 2511(2)(d) does not as a matter of law exempt from Wiretap Act liability hidden camera recording used in news broadcast), *aff'd*, 661 F.2d 917 (4th Cir. 1981).

B. If, as the Ninth Circuit Found, CNN Acted Under Color of Law for *Bivens* Purposes Based on CNN's Alleged Association With Law Enforcement Agents, Then 18 U.S.C. § 2511(2)(c) Applies and Expressly Exempts CNN From Wiretap Act Liability.

Under 18 U.S.C. § 2511(2)(c), a party who acts "under color of law" is permitted to record a conversation with one participant's consent, regardless of the recording party's purpose. Though CNN disputes the Ninth Circuit's conclusion that CNN acted under color of law for *Bivens* purposes, if that conclusion is correct, then CNN also acted under color of law for purposes of the Wiretap Act for the reasons discussed below, and its conduct, thus, was permissible under § 2511(2)(c).

On the Bergers' *Bivens* claim, the Ninth Circuit held that CNN could be held liable for an alleged violation of the Bergers' Fourth Amendment rights. It reached this conclusion by finding, first, that the FWS violated the Fourth Amendment by allowing the news media to observe and record its search of the Berger ranch. App. 9a-10a. Second, the court contended that CNN could be liable for this constitutional violation, even though as a private actor it normally would not be subject to the Fourth Amendment's strictures, because of its "joint action" with the government. App. 19a. This determination amounted to a finding that CNN acted "under color of law," as that term is used for purposes of establishing civil-rights liability. Specifically, the court found that CNN and the FWS agreed "to engage jointly in . . . the execution of a search warrant . . . ." App. 19a. CNN vigorously disagrees with the Ninth Circuit's conclusion that it acted "under color of law" when, for independent newsgathering purposes, it arranged to be present and record government officials' execution of a search warrant. However, the Ninth Circuit, having concluded that CNN's involvement with law enforcement officials meant that CNN acted under color of law for *Bivens* purposes, simply acted consistently when it held that CNN also acted under color of law for purposes of the Wiretap Act. App. 21a-22a.

The Bergers contend that the phrase "color of law" has a different meaning in the civil-rights context than it does under the Wiretap Act. Cross-Pet. at 19. Even if true, this argument does not help the Bergers. Only two courts—the Ninth Circuit in the opinion below and the Seventh Circuit in *Thomas*—appear to have considered the differences between the two "color of law" requirements,[20] and both agree that a party acts under color of law for purposes of 18 U.S.C. § 2511(2)(c) when it is "acting under law enforcement authority." App. 22a. Inherent in the Ninth Circuit's holding that CNN jointly planned and executed the search with law enforcement agents was the conclusion that "both the federal appellees and the media appellees were acting under authority of a search warrant," and thus that § 2511(2)(c) applies.[21]

Attempting to find some basis for review by this Court, the Bergers assert that the Ninth Circuit opinion is in conflict with *Thomas*. They are in error. *Thomas* arose in an entirely distinguishable factual context. A state college basketball coach allegedly recorded telephone conversations with a potential recruit in an effort to prove that a rival school had offered the recruit perks in violation of a collegiate athletic association's rules. 998 F.2d at 448.

---

[20] "The vast majority of cases involving the § 2511(2)(c) 'color of law' exception focus on whether a party to the intercepted communications had truly 'consented' to the interception." *Omron Atl. Corp. v. Barr*, 990 F.2d 861, 864 n.8 (6th Cir. 1993). In this case, Agent Scrafford's consent is not disputed. App. 22a.

[21] The Ninth Circuit's analysis on this point is cursory, resting simply on the notion that because CNN was "acting under law enforcement authority," the exception to the Wiretap Act applied. App. 21a-22a. Read in context, however, it is clear that the court's holding on Wiretap Act liability is a direct result of its holding that CNN and the FWS were "joint government actors" and thus that CNN was to be treated in this case as if it were an arm of the government, acting "under the government's cloak of authority." App. 17a-21a. Having previously accepted the Bergers' theory that CNN acted under color of law *because* CNN in effect stood in the shoes of federal agents, the court acted consistently by concluding that CNN acted under color of law under the Wiretap Act as well.

The court held that the coach, though a state employee, did not act under color of law for purposes of 18 U.S.C. § 2511(2)(c). Just as in the Ninth Circuit opinion below, the court found that the statute's "color of law" requirement differed from the civil-rights "color of law" requirement, because § 2511(2)(c) was meant to apply in the law-enforcement context. The Seventh Circuit's concern was that, devoid of any link to law enforcement, broad application of § 2511(2)(c) "would confer on every last employee of federal, state and local government a free pass to record conversations without the second party's consent." *Id.* at 451. Because of the complete absence of any link between the basketball coach's job description and law enforcement activities, the coach did not act "under color of law" for purposes of the Wiretap Act. *Id.* Thus, *Thomas* held only that state employees with no connection to law enforcement cannot benefit from § 2511(2)(c); it expressly did not hold that § 2511(2)(c) applied only to "law enforcement officers acting within the scope of their authority." [22]

In sum, the Bergers cite no evidence that the color of law requirement of 18 U.S.C. § 2511(2)(c) has proven difficult for courts to administer or otherwise requires clarification from this Court. Though "color of law" may not be defined identically for purposes of § 2511 and

---

[22] *Thomas* also is distinguishable in that its analysis was not complicated by a finding that the defendant was a state actor by virtue of the "joint action" theory, as was the Ninth Circuit opinion here. The coach in *Thomas* clearly was a state actor and would have been deemed to act under color of law had he been sued on a civil-rights theory. 998 F.2d at 450. The question was whether he acted under color of law under the Wiretap Act. In holding he did not, the court's prime distinction was between public officials having and not having law enforcement ties. In contrast, the "color of law" question in this case is whether purely private actors who, by virtue of joint action with government *law enforcement officials*, are being treated as law enforcement officials for civil-rights liability also should be treated as law enforcement officials for Wiretap Act purposes. This question was not present in *Thomas* or in any other case cited by the Bergers.

in cases alleging civil-rights liability, the courts are in agreement that a party recording communications in the course of a law enforcement action or investigation is acting under color of law and thus benefits from the § 2511 (2)(c) exemption. App. 21a-22a; *Thomas*, 998 F.2d at 451; *see also Omron Atl. Corp. v. Barr*, 990 F.2d 861, 865 (6th Cir. 1993) (private party who records conversation under nominal and irregular authority of government agents satisfies color of law requirement of § 2511 (2)(c)). In this case, the FWS agents—government officials searching the Bergers' ranch in the line of duty—were acting "under color of law" for both civil-rights and Wiretap Act purposes. The agents had a valid search warrant, and in fact gained evidence for their investigation that resulted in a criminal conviction of Paul Berger. App. 7a. Their actions were at all times connected to a law-enforcement search.[23] The question is whether CNN, a private actor, was a participant in this law enforcement action. The Ninth Circuit held that it was.[24] If that hold-

---

[23] The Bergers assert the FWS did not act under color of law because the agents searched in a manner that exceeded the scope of the warrant. Cross-Pet. at 18. Even if the agents did exceed their authority, the Bergers' conclusion is erroneous because a law enforcement official is deemed to act "under color of law" not just for fully authorized conduct, but also for actions that exceed his authority. *Monroe v. Pape*, 365 U.S. 167 (1961).

[24] The Bergers suggest that the court's refusal to apply the "invited informer" doctrine somehow is relevant to the court's "color of law" analysis. Cross-Pet. at 17-18. This is incorrect. The Ninth Circuit simply held that the "invited informer" exception to government Fourth Amendment liability "was developed in cases where the government placed informers, often with recording devices, to obtain information for legitimate law enforcement purposes." App. 15a. Here, the court found the doctrine did not apply to CNN, which was recording for newsgathering purposes, not to inform on the Bergers.

Along similar lines, the Bergers assert, in support of their argument that CNN did not act under color of law for Wiretap Act purposes, that the FWS "neither applied for nor obtained court authority to wiretap the Bergers . . . because it knew or should have known that the Media's wiretap was illegal." Cross-Pet. at

ing is correct, then it follows that § 2511(2)(c) applies to CNN as it applies to the officers.

II. REVIEW OF THE NINTH CIRCUIT'S REFUSAL TO ISSUE A PRIOR RESTRAINT IS NOT WARRANTED.

This Court should reject the Bergers' request that it review the Ninth Circuit's refusal to issue an injunction barring CNN from telecasting the news footage it recorded of the FWS search. The Bergers have not come close to overcoming the "heavy presumption" against the constitutional validity of prior restraints. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The arguments the Bergers present to justify their request are indistinguishable from arguments flatly and consistently rejected by this Court. As such, the Cross-Petition's arguments do not merit review.

A. This Case Does Not Raise the Question Presented in the Cross-Petition as There Has Been No "Final Judicial Determination" That CNN Did Anything Unlawful.

This case is an inappropriate vehicle for review by this Court because it does not raise the question presented. The Bergers assume, both in their "Questions Presented" and their substantive argument, that a "final judicial determination" has been made that CNN's newsgathering practices were illegal or unconstitutional. Cross Pet. at *i*, 24-26. That assumption is wrong. There has been no such final judicial determination. The appeal to the

---

22. But the record contains no evidence why the FWS did not apply for court permission to record conversations with the Bergers; in any event such permission was unnecessary because the FWS agents did not "wiretap" the Bergers. CNN, not the FWS, did the recording at issue here. Because CNN did so with Agent Scrafford's consent, no court order was necessary—the recording for newsgathering purposes expressly was permitted either by 18 U.S.C. § 2511(2)(c) or (2)(d). The lack of any judicial authorization for CNN's permissible recording was irrelevant to the Ninth Circuit's conclusion that CNN and the FWS acted "under authority of a search warrant." App. 22a.

Ninth Circuit arose after the district court granted CNN's motion for summary judgment; the Ninth Circuit reversed in part and remanded for further proceedings to determine whether the Bergers could prove the defendants' liability. App. 26a. CNN's liability, if any, has yet to be adjudicated.

B. The Denial of the Bergers' Requested Prior Restraint of News Footage Follows From an Unbroken Line of Authority From This Court.

CNN denies that its recording of the FWS actions at the Berger ranch violated any law or constitutional provision. But even if the Bergers were to prevail at trial on their claims of damage arising from CNN's *newsgathering*, an injunction against the *telecast* of that footage would be unjustified.

This Court never has upheld a prior restraint on the news media. Instead, it has held that the First Amendment dictates that injunctions against publication or broadcast are impermissible in all but the most extraordinary circumstances. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557-59 (1976). This Court's prior cases make clear that the Bergers do not come close to demonstrating such circumstances exist here: Even where the news media obtain information through allegedly improper means, the appropriate remedy is damages or criminal sanctions, not an injunction. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to suppress publication of Pentagon documents classified top secret and obtained by newspapers without authorization).

CBS, Inc. v. Davis, 510 U.S. 1315 (Blackmun, Circuit Justice 1994), is instructive. CBS surreptitiously videotaped a meat-packing operation and planned to televise the footage on a news broadcast. Plaintiffs sued in state court for trespass, other torts, and violation of a trade secrets statute and obtained a preliminary injunction barring CBS from broadcasting the undercover footage it gathered at the plant. In staying the injunction, Justice Blackmun held:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remedy" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

Id. at 1317 (citations omitted).

In issuing his ruling, Justice Blackmun rejected the same arguments the Bergers rely on to justify their requested injunction. Enjoining a broadcast is not appropriate even where the videotape in question "was obtained through 'calculated misdeeds' " of the broadcaster. *Id.* Similarly, alleged economic harm also is an insufficient basis upon which to impose a prior restraint. *Id.* "Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context." *Id.*

The Bergers argue that CNN's alleged (and still unproven) "violation of the Fourth Amendment empowers the courts to enjoin further action by the Media," including CNN's future use of the truthful news footage it obtained during the FWS search. Cross-Pet. at 26. The Bergers cite no authority for this assertion, and it appears that there is none.[25] As the First Circuit has noted, "[W]e have not found any case upholding a prior restraint issued to protect Fourth Amendment rights." *Matter of*

---

[25] The Bergers refer to a footnote in Justice Harlan's concurrence in *Bivens* stating that courts have the power to enjoin invasions of constitutionally protected interests. Cross-Pet. at 26 (citing 403 U.S. at 404 n.5). This footnote is part of an analysis of the federal courts' general authority to grant *any* relief for violations of constitutional authority absent a specific grant from Congress. *Bivens*, of course, held that a Fourth Amendment violation does give rise to a federal cause of action for damages. Neither this holding nor Justice Harlan's concurrence in any way supports the kind of relief the Bergers seek.

Providence Journal Co., 820 F.2d 1342, 1350 n.55 (1st Cir. 1986), *opinion modified on reh'g on other grounds*, 820 F.2d 1354 (1987). Indeed, this Court has held that restraint of the news media is inappropriate even in the face of competing constitutional interests. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Sixth Amendment right to fair trial did not justify prior restraint of press); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (constitutional authority of executive branch to conduct foreign affairs and enforce national security did not justify prior restraint); *accord Davis*, 510 U.S. at 1317.

Furthermore, neither an alleged nor actually proven violation of the Wiretap Act justifies a prior restraint on the news media. "While § 2511 proscribes certain conduct, it in no way provides for a prior restraint of the press in their exercise of their first amendment rights even if the press's conduct clearly violates § 2511." *In re King World Prods.*, 898 F.2d 56, 59 (6th Cir. 1990) (vacating injunction against use of videotape allegedly recorded in violation of Wiretap Act). The same is true of the other torts alleged by the Bergers. *See id.* at 60; *Providence Journal Co.*, 820 F.2d at 1350 ("That publication would prove embarrassing or infringe [plaintiff's] privacy rights is . . . an insufficient basis for issuing a prior restraint.").

The Bergers attempt to distinguish their claim from other requested prior restraints on the news media by arguing that they merely seek to enjoin further use of the "ill-gotten" news footage in the event a final determination is made that CNN recorded it unlawfully. Cross-Pet. at 6. This Court, however, rejected analogous reasoning in *Near v. Minnesota*, 283 U.S. 697 (1931). In *Near*, a state court issued a permanent injunction barring a newspaper from future publications of "malicious, scandalous and defamatory articles," after determining at trial that the paper previously had published such articles. *Id.* at 705. Along the lines of the Bergers' argument that

their requested injunction is needed to prevent CNN "from using the fruits of its unlawful newsgathering," Cross-Pet. at 24, the state in *Near* defended its injunction as necessary to protect the public from a publication that was in the " 'business' of publishing defamation." 283 U.S. at 720. The Court rejected this reasoning:

> If . . . the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. . . . If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition.

Id.[26] The same is true in this case. If CNN had the right to telecast its footage of the FWS search free from prior restraint in the first instance, then a permanent injunction against some future use of the footage also is unjustified.

Similarly, other courts have held that an injunction barring broadcast or publication is an unconstitutional restraint on speech even when sought *after* the publisher is held liable for publication. *See, e.g., Georgia Soc'y of Plastic Surgeons v. Anderson,* 363 S.E.2d 140 (Ga. 1987) (reversing, as "an impermissible prior restraint" on free speech, injunction barring defendants from disparaging plaintiffs issued after defendants' publication found to be libelous);[27] *cf. Goldblum v. National Broad. Co.,* 584 F.2d 904, 907 (9th Cir. 1978) ("[T]he press

---

[26] "[B]ut if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity," in the form of civil or criminal sanctions *after* publication. 283 U.S. at 714 (quoting 4 William Blackstone, *Commentaries* *151, 152).

[27] Some courts have approved narrow and limited injunctions barring defendants from continuing to make specific charges against plaintiffs after the charges have been found defamatory. *See, e.g., Lothschuetz v. Carpenter,* 898 F.2d 1200, 1208-09 (6th Cir. 1990) (Wellford, J., concurring and dissenting). Such cases are inapt here, however, since the Bergers seek to suppress truthful information.

may not be required to justify or defend what it prints or says until after the expression has taken place.").

The Bergers cannot—and do not—allege that future broadcasts, if any, of CNN's news footage would cause "great and certain" evil that "cannot be militated by less intrusive measures." *Davis*, 510 U.S. at 1317. The Bergers fail to allege any facts which would establish a threat of irreparable (much less "great and certain") harm from future broadcast of CNN's news footage, particularly given that the facts contained in the footage are true and have long since been established and publicized. CNN already has telecast portions of the videotape on multiple occasions (though not since 1994), and much of the information contained in the CNN news coverage was publicized at Paul Berger's criminal trial. But to the extent the Bergers are injured by future CNN broadcasts, they have failed to demonstrate why damages would in any way be an inadequate remedy.[28] In sum, the Cross-Petition should be denied because the Ninth Circuit correctly found the Bergers have no grounds for obtaining an injunction.

---

[28] The Bergers' remaining arguments in support of their requested injunction similarly are meritless. Their assertion that a prior restraint somehow is justified because the First Amendment's "purpose is not to reward criminal, tortious and unconstitutional conduct," Cross-Pet. at 25, rests on the illogical proposition that something cannot possibly have effects outside of its purpose. More significantly, it again ignores the distinction between newsgathering and broadcasting. Even if the Bergers were able to prove the illegality of CNN's *newsgathering*, they still would not have justified prior restraint of ensuing *telecasts*.

Finally, the Bergers' reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), Cross-Pet. at 25, is puzzling, as that case involved an injunction against police chokeholds and did not even discuss the First Amendment or the unique circumstances required to issue prior restraints on the news media.

CONCLUSION

As a matter of simple logic, CNN either did or did not act "under color of law," as that term is used in the Wiretap Act. Either way, recording a conversation with the consent of one of the participants for newsgathering purposes expressly is permitted under the Wiretap Act. Additionally, the Ninth Circuit correctly ruled that the Bergers failed to justify their extraordinary request to enjoin CNN from future telecasts of its news footage. For the reasons set forth herein, the Cross-Petition should be denied.

Respectfully submitted,

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK, INC.
One CNN Center
P.O. Box 105366
Atlanta, GA 30348-5366

P. CAMERON DEVORE *
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC M. STAHL
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Cross-Respondents

* Counsel of Record